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SEP 20

No. 96

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PETITIONER

v.

GREAT NORTHERN RAILWAY COMPANY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court on demurrer (R. 7) is reported in 46 F. (2d) 999. The opinion of the District Court on the merits (R. 121) has not been reported. The opinion of the Circuit Court of Appeals (R. 226) is reported in 57 F. (2d) 385. The reports of the Interstate Commerce Commission upon final determination of the respondent's guaranty are reported as *Guaranty Settlement with Great Northern Railway Co.*, 99 I. C. C. 231, and 111 I. C. C. 318.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 15, 1932. (R. 239.) A petition for a writ of certiorari was filed May 21, 1932, and granted May 31, 1932. (R. 241.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States may recover an overpayment made by the Interstate Commerce Commission.

2. Whether a "partial payment" pursuant to Section 212 of the Transportation Act, 1920, of the guaranty authorized by Section 209 of that Act is final and binding upon the United States and precludes recovery of an overpayment of the guaranty, as later determined by the Interstate Commerce Commission.

3. Whether, if the first question is answered affirmatively, payment to respondent pursuant to Section 212 of a sum in excess of the amount later determined by the Commission to be due respondent under Section 209 was invalid because the Commission did not, as required by Section 212, definitely ascertain that such sum was due on the guaranty.

STATUTE INVOLVED

The pertinent portions of the Transportation Act, 1920, are set forth in the Appendix, *infra*, pp. 32–36.

STATEMENT

This is a suit to recover $1,329,785.89, with interest, representing the difference between $12,500,000 (of which $6,500,000 was paid as advances under Section 209 (h) of the Transportation Act, 1920, and $6,000,000 as a partial payment under Section 212 of that Act) and $11,170,214.02, which the Interstate Commerce Commission finally determined was the amount of respondent's guaranty under Section 209.

The Transportation Act, 1920, provided for terminating Federal control of railroads on March 1, 1920. (41 Stat. 457.) By Section 209 (e) of the Act (*infra*, p. 32), the United States guaranteed to each carrier which had been under Federal control, and to certain others, that its railway operating income for the following six months should be not less than one-half of the amount of the annual compensation to which it was entitled during the period of Federal control. Section 209 (g) (*infra*, p. 33) provided that the Interstate Commerce Commission should, as soon as practicable, ascertain and certify to the Secretary of the Treasury the amounts necessary to make good this guaranty and directed the latter to draw warrants in payment of such certificates. Section 209 (h) (*infra*, p. 34) authorized the Commission to issue to the Secretary of the Treasury certificates for advance payments, upon application therefor during the guaranty period, such advances to be not in excess of

the "estimated amount" necessary to make good the guaranty. The section further provided that the Secretary should not pay such advances until the carrier had executed a contract, "secured in such manner as the Secretary may determine," to repay any amounts received from such advances in excess of the guaranty.

During the guaranty period the respondent applied for $6,500,000 in advances and during 1920 certificates totalling this amount were issued and paid. (R. 16, 28, 39.) On February 14, 1921, the respondent filed with the Commission its guaranty claim amounting to approximately $18,500,000. (R. 41.) The supporting data filed therewith consisted of a book of 119 pages of tables and statistical matter. (R. 57.) Two days later, February 16th, respondent by letter advised the Commission that it required a $6,000,000 advance in order to meet pressing obligations. (R. 136–137.) Recognizing that under existing law such advance payment could not be made because not applied for during the guaranty period, respondent requested a certificate for this sum to be used not later than February 24th "as collateral for a bank loan." (R. 137.)

On February 16, 1921,[1] the chief accountant of the Bureau of Finance of the Commission, who had charge of the examination of returns submitted in support of guaranty claims, began examining re-

[1] The chief accountant appears to have been in error in stating on cross-examination (R. 59–60) that examination of the return began February 14, 1921. (R. 46, 97.)

spondent's return, assisted by employees of the Bureau working under him. (R. 36–37, 46, 59.) He worked upon this return under instructions to make calculations along the same lines as those which were made when respondent's previous applications were under consideration (R. 46), the latter having required simply a determination that the amounts applied for were not in excess of the "estimated amount" of the guaranty. It was understood that the certificate was to be used "not with the expectation of getting money from the United States Treasury" but for credit purposes. (R. 47.)

Important principles entering into the calculation of the guaranty were then under consideration by the Commission and unsettled. (R. 47.) One of these involved the allowance for maintenance, which required estimating the ratio or ratios to be applied in determining the increased cost of labor and materials in the guaranty period as compared with the "test" period. (R. 44, 58–59.) In this situation the figures in the return were mathematically checked and "obviously unallowable items or seemingly obviously unallowable items" were eliminated. (R. 74, 98.) The result was to reduce respondent's claim from about $18,500,000 to about $15,700,000 which, after certifying an additional $6,000,000, "would apparently leave a sufficient margin [about $3,200,000] for possible future deductions after the Commission had determined the

principles" to be applied in fixing maintenance and other matters which were then under consideration. (R. 74, 212.) The Commission was informed of the principles upon which respondent had calculated its claim, but the Commission neither accepted nor rejected them (except those involved in eliminated items). (R. 58–59, 119.) The chief accountant testified that the examination was "superficial," "very perfunctory," that it was "a pure and simple estimate on our part," that "no part of it whatsoever had any intent of finality" and that he did not regard the Bureau's examination "as being a sufficient basis for a definite ascertainment for making a Section 212 certificate." (R. 47, 48, 55, 93–94.)

The report of the Bureau of Finance to Division 4 of the Commission, which had charge of guaranty claims, shows $15,705,688 as "Estimated amount necessary to make good the guaranty." (R. 212.) In four other places in the report the Bureau characterizes the conclusions which it had reached as an "estimate" or "estimated." (R. 211–213.) The report recommended "a partial payment for credit purposes only of $6,000,000." (R. 213.) The memorandum forwarding the report to Division 4 is dated February 21, 1921, but the report itself bears the date of February 19, 1921, indicating that it was completed three days after respondent first applied for the certificate. (R. 210, 213.) The Commission's certificate for $6,000,000 was is-

sued February 23, 1921, and forwarded to the Secretary of the Treasury on the same date with a letter stating that the Commission understood that "the present certificate is desired purely for use as the basis of credit with this company's bankers." (R. 133, 134.)

On February 26, 1921, the so-called Winslow bill was enacted, amending the Transportation Act, 1920, by adding a new section designated Section 212 (*infra*, p. 35). That section authorized the Commission, if not at the time able finally to determine the whole amount due under Section 209, to certify as a partial payment "any amount definitely ascertained by it to be due." The Secretary of the Treasury was authorized to pay these certificates, no security from the carrier being required.

By letter dated February 28, 1921, respondent called the Commission's attention to the change in the law and requested, in lieu of the certificate of February 23, 1921, a new certificate for $6,000,000 with which it could obtain funds from the Treasury. (R. 138–139.) The Bureau of Finance acted upon this application the same day and, without any further examination or consideration of respondent's return, recommended on February 28, 1921, in favor of such a certificate. (R. 49, 214–217.) The Bureau changed its earlier report merely to make it conform to the language of the new section of the Act, eliminating the words "estimate" and "estimated," and recommended cancellation of the

earlier certificate. (R. 50, 215–217.) On the following day, March 1, 1921, the Commission issued to the Secretary of the Treasury a second certificate for $6,000,000 and cancelled its certificate of February 23, 1921. (R. 22.) The Secretary of the Treasury shortly thereafter paid the respondent the $6,000,000. (R. 16, 28.)

On July 3, 1922, the respondent filed in support of its guaranty claim a final return which included all items entered on its books to December 31, 1921. (R. 51.) This return was checked against the respondent's books and its annual and monthly reports, and in the examination various principles determined by the Commission after March 1, 1921, were applied. (R. 44–46, 53, 71.) The result was that the Commission, by Division 4 (99 I. C. C. 231), under date of June 17, 1925, issued a report and certificate making a final determination pursuant to Section 209 (g) of respondent's guaranty at $11,178,887.31. (R. 178–183.) Upon respondent's application the case was reopened and argued before the full Commission which, on June 8, 1926 (111 I. C. C. 318), issued a report and amended certificate fixing respondent's guaranty at $11,170,-214.02. (R. 183–207.)

Respondent then brought suit under the Act of June 18, 1910, c. 309, 36 Stat. 539, as amended by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, to annul the Commission's certificate of June 17, 1925, and its amended certificate of

June 8, 1926. This Court affirmed the lower court's decree dismissing the bill for want of jurisdiction. *Great Northern Railway Co.* v. *United States,* 277 U. S. 172.

In its original complaint in this proceeding, the United States set forth the payments to respondent aggregating $12,500,000, the Commission's final amended certificate fixing the amount of respondent's guaranty at approximately $11,170,000, and respondent's refusal to pay the difference of about $1,330,000. (R. 1–5.) The District Court sustained a demurrer to this complaint, holding that Section 212 of the Transportation Act, 1920, made certificates issued thereunder final and binding upon the United States. (R. 7–14.) The United States then filed an amended complaint containing the additional allegations that the overpayment to respondent was made through mistake and without authority of law. (R. 14–18.) This allegation was put in issue by the respondent's answer. (R. 28.) The case was tried to the court, trial by jury being waived. (R. 29.) After trial each party moved for judgment. (R. 31.) The court delivered an oral opinion, holding that the Commission's certificate under Section 212 was not issued by mistake or without authority of law. (R. 121–129.) On appeal, the Circuit Court of Appeals held that the District Court had correctly interpreted the statute and that its judgment on the merits was sustained by the evidence. (R. 226–239.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that payment made pursuant to a certificate issued under Section 212 of the Transportation Act, 1920, is final and binding upon the United States.

2. In holding that the finding of the District Court that the Commission's certificate of March 1, 1921, was not made through mistake or without authority of law was sustained by the evidence.

SUMMARY OF ARGUMENT

I. The respondent in this case has received an overpayment of public funds. This Court has established in numerous decisions that overpayments made by officers of the United States may be recovered by the United States in an action at law, whether such overpayments were made under a mistake of law or fact or not. These cases allowing the United States to recover an overpayment are not based on fraud, deceit, duress, or the like. They hold that when an overpayment is made by government officers, the Government has a right to recover, regardless of the type or character of the officers' error or mistake. In this case it is admitted that the respondent has received more than the Commission has ultimately determined to be due. This overpayment, we submit, may be recovered by the United States without regard to the circumstances under which it arose.

II. Certificates issued under Section 212 of the Transportation Act, 1920, are not final and binding on the United States so as to bar it from recovering from carriers money paid out of the Treasury pursuant to such certificates in excess of the amount finally ascertained by the Interstate Commerce Commission to be due such carriers under Section 209 of that Act. Section 209 (g) contains the only provision in the Act for final determination of guaranty claims. Even if Congress did intend determinations under Section 212 to be something more than mere estimates, it does not follow therefrom that the United States was to be denied the right to recover if partial payment certificates were nevertheless issued for an amount in excess of that finally ascertained to be due. No reason of policy existed for making partial payments under Section 212 final. On the other hand, Section 212 was enacted to give the carrier speedy relief from a distressing financial situation, and hasty and tentative determinations were necessary to give it the effect intended. It is unsound to contend that the Commission, after issuing partial-payment certificates under Section 212, retained jurisdiction for the purpose of increasing but not decreasing the total amount of the guaranty. Statutes granting privileges or relinquishing rights must be construed favorably to the Government.

III. The Commission issued its partial payment certificate of March 1, 1921, through mistake or

without authority of law. Even if Congress intended that payments made pursuant to certificates issued under Section 212 should be based upon a definite ascertainment which should be final and binding upon the United States, it does not follow that in this case the United States is not entitled to recover because the record shows that no definite ascertainment was made. During the year 1920, the Commission certified three advances to respondent pursuant to Section 209 (h), Transportation Act, 1920. Subsequently, respondent filed its guaranty claim and a return, which was incomplete and was revised and augmented by respondent from time to time in the following several years. Respondent requested, on the basis of this return a certificate for $6,000,000 to be used for credit purposes. The Commission's Bureau of Finance, after a cursory examination of the return, estimated that the Commission could safely issue the requested certificate. Three days after the issuance thereof Congress enacted the Winslow bill containing Section 212, which authorized the Commission to certify any amounts definitely ascertained by it to be due as partial payments to carriers. Two days after the enactment of the Winslow bill, respondent advised the Commission that it wanted immediately a certificate pursuant to Section 212. Without any further examination of respondent's return (R. 49–50) the Bureau of Finance recommended in favor of such a certificate and the same was issued on the following day. At the time the

certificate pursuant to Section 212 was issued, the Commission had not determined upon many of the accounting principles to be followed in making a final ascertainment, and some of these principles were not determined upon for many months thereafter. Delay in issuing the certificate until the determination of these principles was completed would have defeated the purpose of the Act and the desire of respondent for immediate advance of money. The certificate under Section 212 was based purely upon an estimate and was not a definite ascertainment within the meaning of Section 212. A certificate by a governmental body issued in excess of authority is invalid regardless of what it purports. Public funds paid by mistake or without authority of law may be recovered. The payment pursuant to the certificate was unlawful.

ARGUMENT

I

THE UNITED STATES MAY ALWAYS RECOVER AN OVERPAYMENT MADE BY ITS OFFICERS

The respondent in this case has received an overpayment of public funds. It has admitted that it has received $12,500,000 from the United States (R. 16, 28), and that the Interstate Commerce Commission has finally certified that $11,170,214.02 was the amount necessary to make good to the respondent the guaranty provided by Section 209. (R. 17, 29.) The function imposed upon the Commission by Section 209 is purely administrative, and in no sense judicial. Its task is to determine the

amount required to make good the guaranty, a task which this Court said, in *Great Northern Ry.* v. *United States,* 277 U. S. 172, 180, might appropriately have been performed for the Treasury by its Comptroller or auditors, or by other trusted officials. The decisions of this Court leave no doubt that if the task had been performed by such officials the overpayment would be recoverable by the United States. The principle of these decisions has like application to the overpayments here involved.

In *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190, a railroad sued in the Court of Claims for a balance alleged to be due as compensation for carrying mails. The United States counterclaimed for certain sums alleged to have been previously paid to the railroad in excess of the Postmaster General's authority, for the reason that land grant railroads were required by law to carry mail at eighty per cent of the full rate, and this railroad, though within that class, had received certain payments at the full rate. The Court of Claims allowed the counterclaim and the judgment was affirmed by this Court. A similar question was involved in *Grand Trunk Western Railway Co.* v. *United States,* 252 U. S. 112. This Court allowed the recovery of an overpayment, saying (p. 121):

> It matters not how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to recover it was deferred. The statute of limitations does not ordinarily run against the

United States and would not present a bar to a suit for the amount.

United States v. *Burchard,* 125 U. S. 176, is another decision in which this Court allowed the United States to recover an overpayment of public funds.[2]

This principle has frequently been applied to allow the United States to recover erroneous refunds of taxes. Although the Commissioner of Internal Revenue has at one time determined that a tax has been overpaid, and as a consequence of this determination, money has been refunded to the taxpayer, the United States is not precluded from recovering the amount of the refund if it later appears that the Commissioner's first determination was erroneous. *Burnet* v. *Porter,* 283 U. S. 230.[3]

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[2] See also *Sutton* v. *United States*, 256 U. S. 575; *Talcott* v. *United States*, 23 F. (2d) 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604; *United States* v. *Sutton Chemical Co.*, 11 F. (2d) 24 (C. C. A. 4th); *United States* v. *Kerr*, 196 Fed. 503 (C. C. Ore.); *United States* v. *Gillmore*, 189 Fed. 761 (C. C. S. D. N. Y.); *United States* v. *Dempsey*, 104 Fed. 197 (C. C. Mont.); *United States* v. *Saunders*, 79 Fed. 407 (C. C. A. 1st).

[3] Other cases to the same effect are *Baumgartner* v. *Commissioner*, 51 F. (2d) 472 (C. C. A. 9th), certiorari denied, 284 U. S. 674; *Champ Spring Co.* v. *United States*, 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539, 546–547, certiorari denied as to this point, 281 U. S. 717; *McIlhenny* v. *Commissioner*, 39 F. (2d) 356 (C. C. A. 3d); *Austin Company* v. *Commissioner*, 35 F. (2d) 910 (C. C. A. 6th), certiorari denied, 281 U. S. 735; *United States* v. *Bartron*, 35 F. (2d) 765 (D. S. D.); *Talcott* v. *United States*, 23 F. (2d) 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604;

The analogy between these cases allowing recovery of erroneous tax refunds and the present case is perfect. In each situation there is an administrative determination followed by a payment of public money, and thereafter another administrative determination that the payment made was excessive. In the tax cases it is uniformly held that the first administrative determination is not final and conclusive and that it does not bar the United States from recovering so much of the payment as was in fact erroneous. Similarly, here, the administrative tribunal which was given final authority in the matter has determined the respondent has received an overpayment. Such an overpayment may be recovered by the United States.

The cases allowing the United States to recover an overpayment made by its officers are not based upon fraud, deceit, duress, or the like. They hold that when an overpayment is made by Government officers, the Government has a right to recover, regardless of the type or character of the officers' error or mistake. Since it is admitted in this case that the respondent has received more than the Commission ultimately determined to be due, we submit that it is clear that there has been an overpayment and that, under the decisions of this Court, that overpayment may be recovered by the United States without regard to the circumstances under which it was received.

United States v. *Standard Spring Mfg. Co.*, 23 F. (2d) 495 (D. Minn.); *United States* v. *Tuthill Spring Co.*, 55 F. (2d) 415 (N. D. Ill.).

II

CERTIFICATIONS UNDER SECTION 212 OF THE TRANSPORTATION ACT, 1920, ARE NOT FINAL AND BINDING UPON THE UNITED STATES

Respondent has not set up any defense in the nature of estoppel. So far as appears it has not changed its position in reliance upon any understanding that the payment to it under Section 212 was a *pro tanto* final settlement. It necessarily admits that the Commission, which under the statute was required to determine the amount of the guaranty, has found that respondent has received from the United States more than the amount of the guaranty payable to it under Section 209. It rests upon the technical defense that Section 212 bars recovery of the overpayment.

That partial payment certificates issued under authority of Section 212 were not intended to be final *pro tanto* is indicated by the language of that section. In authorizing certifications of amounts definitely ascertained to be due, the section says the Commission "may thereafter in the same manner make further certificates, until the whole amount due has been certified," such process to be followed by the Commission "if not at the time able finally to determine the whole amount due." There is no express provision or implication that mistakes in the issuance of certificates under Section 212 may not be corrected later and overpayments resulting therefrom recovered by the United States.

Furthermore, Section 212 authorizes a "partial payment." A payment which is in excess of the total obligation can not be said to be a "partial payment" thereof.

Importance was attached by the Circuit Court of Appeals to extracts from Congressional debates and statements by members of committees in charge of the Winslow bill, which tend to support the view that Congress intended that the Commission should make definite ascertainments of partial amounts, and that certificates were not to be issued on tentative determinations. But even if Congress did intend that determinations under Section 212 were to be something more than mere estimates for the purpose of making advances on account, it does not follow that Congress intended to deny to the United States the right to recover if partial-payment certificates were nevertheless issued for an amount in excess of that finally ascertained to be due under Section 209 (g).

The Circuit Court of Appeals, however, appears to have regarded Section 212 as authorizing certificates having the same force and effect as certificates under Section 209 (g). While the latter section does not expressly prohibit subsequent corrections by the Commission of certificates authorized thereunder, such a prohibition may perhaps be implied, to the end that finality may be ultimately given to the Commission's determinations. But no such reason of policy exists for imparting finality to the determinations of the Commission in passing upon

applications for partial payments, which presuppose further consideration and determination. In the enactment of Section 209 (g) Congress expressed an entirely different purpose from that in the enactment of Section 212. The former was to provide an ultimate determination of the amount of the guaranty, which would involve much time and labor and would fix property rights of carriers. The latter was an emergency measure, designed to afford partial and speedy relief to the carriers, many of which needed funds immediately in order to continue operations. *Northern Pacific Ry. Co.* v. *Interstate Commerce Commission*, 23 F. (2d) 221 (App. D. C.), certiorari denied, 275 U. S. 572. See also *Texas and Pacific Ry. Co.* v. *United States*, No. 634, decided by this Court May 16, 1932; *United States* v. *Guaranty Trust Company*, 280 U. S. 478, 484.

It is submitted that the construction of Section 212 adopted by the courts below is inconsistent with the avowed purpose of Congress in enacting this legislation to give the railroads relief in the credit crisis then confronting them by making immediately available to them a part of the guaranty which they would ultimately receive from the Government.[4] This purpose presupposed prompt and necessarily tentative decisions by the Commission.

[4] See statement of Chairman of House Committee on Interstate Commerce when reporting the bill which became the Act of February 26, 1921 (Cong. Rec., vol. 60, pt. 3, p. 2737), and the House Committee's report on the bill (H. Rep. No. 1243, 66th Cong., 3rd Sess., p. 3).

But it was also the duty of the Commission to guard against overpayments of the guaranty. It could not, consistently with this duty, authorize the partial payments contemplated by Congress if, when so doing, it was finally concluding the rights of the United States and barring the recovery of any payments later found to be excessive. If the Commission had acted on the view adopted by the courts below, the real purpose of Congress would have been frustrated, since of necessity all payments would have been withheld until the ultimate right to retain them had been finally determined.

That the Commission regarded payments under Section 212 as tentative and for the purpose of meeting an emergency is further indicated by the fact that similar overpayments were made to a large number of other carriers. Many of these overpayments were made immediately after the passage of the Winslow bill and within a few weeks of the payment to the respondent. The overpayments in these other cases show a contemporaneous construction by the Commission of its functions under Section 212; a construction which was accepted without question by a number of the carriers who refunded without protest the amounts thus overpaid.[5]

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[5] In at least 28 cases the Commission, upon final determination of the guaranty, found a previous overpayment. (R. 187.) In 22 of the 28 cases the carrier refunded or promised to refund the overpayment. (R. 187.) Revised figures furnished by the Treasury Department on September 8, 1932, show that overpayments aggregated $3,779,719.59,

That Section 212 was intended to afford a form of relief inconsistent with any final and conclusive determination of the guaranty, is illustrated by the facts of this case. Two days after the section was enacted, respondent's president wrote the Commission (R. 138–139) urging it promptly to issue a certificate thereunder in lieu of, and in the same amount as, the prior certificate which had been issued under Section 209 (h) and which admittedly was subject to subsequent revision and correction.

We submit that it is a fair inference that when this request was addressed to the Commission, neither respondent nor the Commission regarded Section 212 as authorizing certificates which would finally conclude the rights of either party so as to preclude correction of errors incident to granting the prompt relief which respondent sought.

The Circuit Court of Appeals (R. 235–236) gave weight to the fact that Section 209 (h) made the payment of advances contingent upon the carrier's execution of a contract, secured as the Secretary of the Treasury might determine, to repay any advance received in excess of the guaranty, and that

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and, apart from the instant case, $2,449,933.61. Of this latter amount approximately $2,260,000, including interest, has been refunded to the United States. Many of the individual overpayments were substantial. Respondent received the largest single overpayment, but the second largest amounted to $1,320,241.73, or only about $9,500 less than that to respondent. At least 7 of the overpayments exceeded $100,000.

the House rejected an amendment which would have added this requirement to payment of certificates under Section 212. The proposed amendment was opposed on two grounds: (1) that it would interfere with the effectiveness of the relief to carriers since many short lines could not furnish adequate security, and (2) that the Interstate Commerce Commissison was authorized to certify only those amounts which it had definitely ascertained were due. (Cong. Rec., vol. 60, pt. 3, pp. 2812–2814.)

It is submitted that rejection of the amendment under these circumstances does not show that Congress intended by Section 212 to bar the United States from recovering payments made thereunder if in excess of what was finally determined to be due. To construe Section 212 as barring the United States from recovery of excess payments would bring it into conflict with Section 209 (g) under which the amount of the guaranty was to be determined by the Commission and liquidated by the Secretary of the Treasury. Furthermore, the fact that Congress considered deposit of security unnecessary because the Commission was authorized to certify only those amounts which it had finally ascertained were due, does not indicate that Congress intended to bar recovery if overpayments should in fact occur notwithstanding the intention that they should not.

In the courts below, respondent urged that paragraph (b) of Section 212 supports its construction of the statute. That paragraph (*infra,* p. 35) pro-

vides that the Commission, in computing partial payment certificates, may include an estimate of the net effect of deferred credits and debits provided the interested carrier has agreed to the estimate. It also provides that any amount so agreed to shall be *prima facie but not conclusive* evidence of its correctness in final settlement. From this provision respondent draws the inference that all other items included in the computation of partial payment certificates were to be conclusive in final settlement. If any inference is permissable it is to the contrary, because the language of the last clause of paragraph (b) of Section 212 indicates that the partial settlement is not final and may be readjusted under Section 209 (g). Manifestly the procedure provided in Section 212 was intended to be subsidiary to the final settlement later to be reached under Section 209 (g).

There is no sound basis for contending that partial payment under Section 212 would exhaust the Commission's jurisdiction except for the purpose of increasing the total amount of the guaranty by the issuance of later certificates. From respondent's position it would result that the Government would be bound by certificates under Section 212 but the carriers would not. The theory is similar to that rejected by this Court in *Gordon* v. *United States*, 7 Wall. 188, 195, where it was said that "an arbitrament and award which concludes one party only is certainly an anomaly in the law." It is a familiar rule of construction that statutes granting

privileges or relinquishing rights must be construed favorably to the Government. *Caldwell* v. *United States,* 250 U. S. 14, 20; *Slidell* v. *Grandjean,* 111 U. S. 412, 437. It is submitted that the rule is applicable here. While the guaranty authorized by Section 209 is not a gift or subsidy, it is also not in fulfillment of any legal obligation, and, broadly speaking, it authorized a large payment of public funds without direct consideration therefor. See *Texas & Pacific Ry. Co.* v. *United States, supra.*

III

THE COMMISSION ISSUED ITS PARTIAL PAYMENT CERTIFICATE OF MARCH 1, 1921, THROUGH MISTAKE OR WITHOUT AUTHORITY OF LAW

Even if Congress had intended that payments made pursuant to certificates issued under Section 212 should be based upon a definite ascertainment which should be final and binding upon the United States, it does not follow that the United States is not entitled to recover. The record shows that no definite ascertainment was made. Section 212 authorizes the Commission, if not finally able to determine the whole amount due to a carrier under Section 209, to "make its certificate for any amount definitely ascertained by it to be due." A certificate which is not based upon a definite ascertainment is not a certificate within the authority of Section 212, and payment thereon is not payment authorized by law. The courts would probably hesi-

tate, in the absence of convincing evidence, to hold that the Commission had issued a certificate under Section 212 without the definite ascertainment required by law, but it is our contention that the Commission did not prior to March 1, 1921, definitely ascertain that an additional $6,000,000 was due respondent on account of the guaranty.

The evidence shows that in issuing the certificate which resulted in the overpayment the Commission merely estimated the amount certified for partial payment, and that there was no definite ascertainment, as required by Section 212.

During the year 1920, the Commission had certified three advances to respondent pursuant to Section 209 (h). (R. 19–22.) The information submitted by respondent in support of its applications for advances consisted principally of its income account for part of the guaranty period in connection with the comparative returns for the same months in the years 1918 and 1919 (R. 37), the actual financial results of respondent's operations for the preceding portion of the guaranty period and estimates of anticipated earnings for the remaining months of the guaranty period (R. 38, 39). The data submitted in the return was hastily examined by the Commission and was accepted as indicating what respondent might earn during the guaranty period as the basis for the Commission's estimate for the amount that might then be advanced. It is clear that the Commission did not

make a determination which could be characterized as final or definite. Indeed the testimony shows that before the Commission issued its certificate to respondent for a $6,000,000 partial payment under Section 212 on March 1, 1921, it made substantially the same perfunctory and cursory kind of examination of the data before it as it had made when passing upon applications for advances.

The Commission's only examination of respondent's data was prior to the enactment of Section 212. (*Supra*, pp. 4–8.) The accountant of the Bureau of Finance, who had charge of the examination, was instructed to make the same kind of examination as those made upon applications for advances, which required merely an estimate of the guaranty. (R. 46.) The examination was made with the understanding that the certificate required was to be used for credit purposes only and not for obtaining money from the United States. (R. 47.) The guaranty claim which respondent had filed on February 14, 1921 (R. 41), was accompanied by a return showing a greater volume of detailed information but was comparable and similar in character to that furnished in the earlier returns when respondent was asking for advances, in that it disclosed information with respect to the same accounts and the same items of revenue and expenses (R. 42). The information submitted with the claim filed on February 14, 1921, was not in fact final and complete, nor was it so regarded because

respondent's books had not been closed for the guaranty period and there were still numerous outstanding accounts subject to adjustment. (R. 42.) For this reason, respondent itself stated in the return that "the schedules following are, as near as can be determined at this time, a basis for settlement under Section 209, Transportation Act, 1920." (R. 42.) The data submitted with the claim was frequently revised and augmented from time to time as respondent's accounts for the guaranty period were finally adjusted up to and including as late a date as January 30, 1925. (R. 51–53.) Application for an additional $6,000,000 on the return of February 14, 1921, was made two days later (R. 136), and the Commission's credit certificate was issued nine days later. (R. 133.)

The Commission's accountant, who was in charge of the examination of the data, testified that his accountants proceeded in exactly the same manner as they had in examining applications for advances; that their result was a "pure and simple estimate"; that no part of it had "any intent of finality" (R. 47); and that at no time was the certificate issued March 1, 1921, regarded as a definite ascertainment (R. 93–94). Not only did the Commission regard its certificate of March 1, 1921, as of the same character as the previous advances, but respondent's own application made no reference to partial payment but stated that "we must obtain an *advance* on account of the Guaranty period."

(R. 136–137.) At the time the data were examined to determine whether a credit certificate, as requested on February 16, 1921, should be issued, Section 212 had not been enacted and there was no authority in law for making definite ascertainments of any amount less than the total ascertainment of the guaranty due under Section 209 (g). The accountants, therefore, had no reason to proceed along any different lines from those they had theretofore followed in examining applications for advances.

The Winslow bill, containing Section 212, was enacted as an amendment to the Transportation Act, 1920, on February 26, 1921. Two days later, respondent called the Commission's attention to the change in the law, and requested in lieu of the credit certificate a new certificate for $6,000,000 with which it could obtain funds from the Treasury. (R. 138–139.) Upon the same day, without any further examination or consideration of respondent's return, the Bureau of Finance acted and recommended in favor of such a certificate. On the following day the certificate pursuant to which payment was made was issued. (R. 22, 49, 214–217.) Thus no determination of any kind, nor any investigation of the data submitted by respondent, was made after Section 212 was enacted. The Bureau of Finance, in reporting to the Commission previous to the enactment of Section 212, had characterized the conclusions reached as estimates. (R. 211–212.) When the law was changed and the re-

quest made for a partial payment pursuant to the new section, the Bureau formally revised its report to conform to the language of Section 212, eliminating the words "estimate" and "estimated." (R. 50, 215–217.) But the fact remained that their report was based upon an estimate and attempted no final determination.

In its computation of respondent's partial payment certificate, the Commission did not eliminate deferred items from the total of respondent's claim which at the end of the guaranty were a little over $1,000,000. (R. 66, 215–217.) Prior to issuing its certificate of March 1, 1921, no agreement was reached with respondent as to the net effect of deferred items. (R. 66, 215–217.) The inclusion of deferred items in the computation without such an agreement with the carrier was in violation of paragraph (b) of Section 212. We submit that on this ground alone the Commission's certificate was invalid.

On March 1, 1921, when the $6,000,000 certificate was issued, the Commission itself had not determined upon many of the accounting and other principles to be followed in making its final ascertainment. For example, it was not until July 12, 1921, that the Commission rendered its decision *In the Matter of Maintenance Expenses Under Section 209,* 70 I. C. C. 115, which prescribed the method to be followed in determining the amount of maintenance to be included in operating ex-

penses of carriers under Section 209. (R. 44.) Nor was it until August 15, 1923, that the Commission decided *In the Matter of Treatment of Salvage, Piece Work and Prices in Settlements Under Section 209,* 82 I. C. C. 678, which prescribed the method of arriving at factors to be used in ascertaining the difference in cost of material during the guaranty and the test periods. (R. 44.) That the determination of these principles was essential to a definite ascertainment of the total guaranty is indicated in the report of the full Commission (111 I. C. C. 318), which is in evidence as Government Exhibit 7. (R. 183.)

A certificate by a governmental body issued in excess of authority is invalid, regardless of what it purports. The certificate of March 1, 1921, was invalid because, as the foregoing shows, it was not based upon a definite ascertainment but merely upon a hasty computation made for other purposes. Recitals in the certificate can not cure such a mistake or create an estoppel as against excess of authority. True, different individuals exercise different standards of care in performing the duties required of them by law. But that is not the question here, since the evidence shows that no attempt was made to make a final ascertainment at all. The United States does not maintain that due care was not exercised in the performance of the Commission's duties under Section 212 in issuing the certificate of March 1, 1921, but rather that

those duties were not performed at all, and that since no ascertainment was in fact made, the certificate did not preclude the United States from recovering sums paid respondent pursuant thereto in excess of the amount finally ascertained by the Commission to be due.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CHARLES H. WESTON,
WENDELL BERGE,
ELMER B. COLLINS,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

SEPTEMBER, 1932.

APPENDIX

Section 209 of the Transportation Act. 1920, c. 91, 41 Stat. 464, 465, 466 (U. S. C., Title 49, sec. 77), provides, in part:

> SEC. 209 (a). When used in this section—
>
> The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; * * *.
>
> The term "guaranty period" means the six months beginning March 1, 1920.
>
> The term "test period" means the three years ending June 30, 1917; * * *.
>
> * * * * *
>
> (b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.
>
> (c) The United States hereby guarantees—
>
> (1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be

less than one-half the amount named in such contract as annual compensation, * * *.

* * * * *

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

* * * * *

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

* * * * *

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts

necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the

Treasury to make the advances referred to in this subdivision.

* * * * *

The Act of February 26, 1921, c. 72, 41 Stat. 1145 (U. S. C., Title 49, sec. 79), provides:

That the Transportation Act, 1920, is hereby amended by adding after section 211 a new section to read as follows:

"SEC. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

"(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely de-

termined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

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